RECEIVED
APR 21 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-1437

In The

Supreme Court of the United States

CUMBERLAND FARMS, INC.,

Petitioner,

v.

NORTHEAST DAIRY COMPACT COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

MARK G. HOWARD
CUMBERLAND FARMS, INC.
777 Dedham Street
Canton, Ma 02021
(781) 828-4900

JAMES B. HADDOW*
LINDA C. RUSSELL
PETRUCCELLI & MARTIN, LLP
50 Monument Square
Post Office Box 9733
Portland, Me 04104
(207) 775-0200

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

THE COMMISSION'S ASSERTION THAT PETITIONER HAS FAILED TO PRESERVE ARGUMENTS ADVANCED IN SUPPORT OF ITS PETITION IS INCORRECT.

(Reply to respondents' brief, pp. 2, 9-12)

In its Brief in Opposition, the Commission makes a number of assertions, both factual and legal, with which Cumberland Farms has already effectively taken issue in its Petition. Cumberland will not belabor those points with further argument. The Commission also raises issues concerning the identities of parties to the Petition and their counsel. *See* Commission's Brief in Opposition at 1. Cumberland has addressed those issues in correspondence to the Clerk of this Court, copies of which have been provided to all counsel. The Commission's Brief does, however, raise one new issue to which Cumberland will respond briefly.

The Commission suggests that one reason for denying the Writ in this matter is that the District Court found Cumberland's argument "that the Commission's regulation purportedly violates the dormant Commerce Clause because it does not treat partially regulated plants exactly the same as pool plants" to have been inadequately preserved. Commission's Brief in Opposition at 11. The Commission's assertion mischaracterizes both the administrative record in this matter and the District Court's opinion. In the District Court's own words, differential treatment of partially regulated plants and pool plants was precisely "the beef that generated this suit." *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 26 F.Supp.2d 249, 257 (D. Mass. 1998) (Pet.

App. 56). The Court's observation reflects accurately both the prior and subsequent procedural history of the case.

Cumberland and other petitioners below have focused on the dormant Commerce Clause as a central issue from the outset. That focus is clear even in their early "Objections" to the Commission's "Proposed Findings of Fact, Conclusions of Law, and Decision," which is reproduced in the Supplemental Appendix ("Supp. App.") attached to the Petitioners' Reply Brief in *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission* (SCUS Docket No. 99-1438). Cumberland hereby incorporates that Supplemental Appendix herein by reference.

Commerce Clause issues framed the claims of Cumberland and its co-petitioners before the Commission. The Commission panel's response to the adjudicatory petitions and supporting affidavits submitted by Cumberland and others was its "Proposed Findings of Fact, Conclusions of Law, and Decision." In reply to the Commission's Proposed Findings, the petitioners before the Commission promptly filed Objections. Supp. App. 1. In their Objections, the petitioners identified the differential redistribution of compact producer prices as the factual basis for their claims. Supp. App. 6-7, 19-20. They also included the same uncontested example of competitive disadvantage adopted by the District Court and repeated by the Court of Appeals (reproduced in Cumberland's Petition at 10-11).[1]

---

[1] While the Commission now insists that it told the Court of Appeals that this example is "entirely counter-factual," both the

Based on the facts as presented in their hypothetical, and on the language of the limited Congressional consent to the Compact, the petitioners argued directly to the Commission that the dormant Commerce Clause prohibited regulations that placed partially regulated plants at a competitive disadvantage. The petitioners summarized their claims by saying that, in approving the Compact, Congress did not immunize Commission pricing rules from application of the dormant Commerce Clause or from competitive discrimination scrutiny. Supp. App. 17-18.

In their opinions, both the District Court and the Court of Appeals relied on the hypothetical example that the petitioners before the Commission had used to illustrate the disparate treatment of partially regulated plants and pool plants. In that example, the differential redistribution for one month placed "the New York handler at a $76,000 competitive disadvantage." 26 F.Supp.2d at 256-57 (Pet. App. 54-55); *New York State Dairy Foods v. Northeast Dairy Compact Commission*, 198 F.3d 1, 5, n.5 (1st Cir. 1999) (Pet. App. 9).

The District Court judge correctly perceived that petitioners' "primar[y] challenge" to this discriminatory pricing feature was that it violated the Commerce Clause. 26 F.Supp.2d at 260 (Pet. App. 67). In the end, however, she concluded that the Commission's scheme for "pricing and pooling of partially regulated plants . . . is not precluded by . . . Condition 7 of the Congress' consent to

---

District Court and the Court of Appeals treated it as uncontested.

the Compact, or the Commerce Clause." 26 F.Supp.2d at 262 (Pet. App. 73). For its part, the Court of Appeals observed that Cumberland's "frontal assault on the over-order pricing regime . . . [is] based on the Commerce Clause . . . " 198 F.3d at 8 (Pet. App. 16). Like the agency and District Court, the Court of Appeals understood that the Commerce Clause issues turned on "the scope of [Congress'] consent" to the Compact. *Ibid* (Pet. App. 18).

On this record, there is no basis for respondents' representation to this Court that the Commerce Clause contentions were "new" when presented to the federal District Court,[2] or that the New York processors' "primary challenge" before the agency and District Court was

---

[2] The Commission's assertion that, under Compact rules, "[a] farmer in New York (outside the region) that supplies a pool [i.e., New England] plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant" is wrong. Compact rules impose specific limitations on any "dairy farmer who produces milk outside of the regulated area." 7 C.F.R. 1301.11(b); Pet. App. 192-93. These rules severely limit the ability of out-of-region farmers to receive the same benefits as their New England peers when their milk is delivered to pool plants. *Ibid.* The Commission has since limited pooled revenue benefits when milk is diverted from the pool plant to manufacturing plants near the originating farm, but "located outside of the regulated area." 7 C.F.R. 1301.23 (1998), as amended by 63 Fed. Reg. 65517 (Nov. 27, 1998). This more recent provision uniquely affects New York farms.

one of Compact statutory construction. Commission's Brief in Opposition at 8, 9-10.

Respectfully Submitted,

JAMES B. HADDOW*
LINDA C. RUSSELL
PETRUCCELLI & MARTIN, LLP
50 Monument Square
P.O. Box 9733
Portland, ME 04104-5033
(207) 775-0200

MARK G. HOWARD
CUMBERLAND FARMS, INC.
777 Dedham Street
Canton, MA 02021
(781) 828-4900

Attorneys for Petitioner

**Counsel of Record*